Supreme Court, U.S.
FILED
SEP 16 1992
OFFICE OF THE CLERK

(4)

No. 91-2015

In The
Supreme Court of the United States
October Term, 1991

F. JOSEPH LOEPER, ROBERT C. JUBELIRER, D. MICHAEL FISHER, CHARLES LEMMOND, HANK SALVATORE, NOAH WENGER, and MATTHEW RYAN,
Petitioners,

v.

BRENDA K. MITCHELL, Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY BRIEF

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INTRODUCTION

This case presents important questions about the role of a state supreme court in promulgating a congressional redistricting plan. The Petition challenges the adequacy of the state court's procedure and the state court's departure from standards used by the federal courts for the protection of constitutional and statutory rights of the voting public. Most of what Respondents said in their Brief in Opposition has no bearing on whether the questions presented by Petitioners are worthy of *certiorari*. Respondents largely defend the decision of the Supreme Court of Pennsylvania on the merits. Petitioners will address these substantive arguments should *certiorari* be granted.

This reply addresses only Respondents' contentions relevant to whether this Court should grant a writ of *certiorari*. Those contentions are (1) that no conflicts exist, (2) that the Pennsylvania Supreme Court can create common law policy, as it does in questions of state law, to justify population deviations higher than practicable among congressional districts, and (3) that two of the issues raised were waived by Petitioners for failure to raise them in the state court proceedings.

RESPONSE

I. CONFLICTS.

The Pennsylvania Supreme Court's decision is in conflict with other state court decisions, federal court decisions and this Court's decisions. In statewide reapportionment generally, whether done by a three-judge federal court or a state court, the important supervisory role played by the federal circuit courts is absent,

making a consistent body of case law unlikely to emerge on a regional basis, much less on the national level, unless this Court liberally exercises its power of review. The conflict of the Pennsylvania Supreme Court's decision with both federal and other state courts illustrates this need.

A. THE PENNSYLVANIA SUPREME COURT'S PROCEDURE IS IN CONFLICT WITH THAT USED BY FEDERAL COURTS AND OTHER STATE COURTS.

The Petition details the truncated and expedited proceedings that took place in the state court in this case. The court considered only plans submitted in a two week period between the filing of a complaint and the start of its three days of hearings. See Petition at 2-3, 7. The court declined to consider refining any of these plans or developing a court plan that more closely met the "one man, one vote" standard while fulfilling other federal constitutional, statutory and case law requirements.

This manner of proceeding is in sharp contrast to, and conflicts with, the careful consideration of all constitutional, statutory and case law requirements, as well as concern for the public, demonstrated by the California and Texas Supreme Courts and the three-judge district court panel in Illinois. See *Wilson v. Eu ("Wilson I")*, 816 P.2d 1306 (Cal. 1991); *Wilson v. Eu ("Wilson II")*, 823 P.2d 545 (Cal. 1992); *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991); and *Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991). It is even in conflict with this Court's decision in *Brinkerhoff-Faris Trust Savings Co. v. Hill*, 281 U.S. 673, 681 (1930), a case cited by Respondents, which held that state courts, even when determining state law, must "accord the parties due process of law."

Respondents, rather than addressing the conflicts, focus solely on justifying the Pennsylvania Supreme Court's exclusion of certain congressional redistricting plans from consideration because

they were submitted after the court's self-imposed twelve day deadline for filing proposed plans, by non-parties who intervened after the deadline was announced. This argument goes to the merits and not to the *certiorari*-worthiness of the questions presented by the Petition.

Petitioners request this court to resolve the conflict between the process used by the Pennsylvania Supreme Court in adopting a reapportionment plan and that used by other courts, which have recognized a full and fair hearing opportunity must be provided that protects the rights of the public as well as those of the litigants.

B. THE PENNSYLVANIA SUPREME COURT'S FAILURE TO OBTAIN SUFFICIENT INFORMATION TO ENSURE THAT THE PLAN IT ADOPTED COMPLIES WITH THE VOTING RIGHTS ACT CONFLICTS WITH THE STANDARD APPLIED BY OTHER STATE AND FEDERAL COURTS.

1. The Pennsylvania Supreme Court's Decision Conflicts with an Ohio Three-Judge District Court Decision on when Minority-in-the-Majority Districts Should be Created.

Respondents claim the Pennsylvania Supreme Court's decision does not conflict with the decision of the three-judge panel in *Quilter v. Voinovich*, No. 91CV-2219 (N.D. Ohio filed January 31, 1992), *probable jurisdiction noted*, 112 S.Ct. 2299 (1992). This is wrong; there is a conflict. In *Quilter* the panel held that neither the Voting Rights Act nor case law mandates the creation of minority-in-the-majority districts wherever possible and that there must be a finding, supported by the evidence, of a violation of the Voting Rights Act before there is justification for the creation of new minority-in-the-majority districts. In contrast, the Pennsylvania Supreme Court adopted the Master's Recommended Decision that "[w]hen possible, an increase in the number of

minority-in-the-majority districts is constitutionally required." Petition App. at A15, A34.

2. The Pennsylvania Supreme Court's Decision Conflicts with the California Supreme Court's Decision on the Creation of Minority Influence Districts.

There is a conflict between the standard used by the Pennsylvania Supreme Court on the issue of the creation of minority influence districts when adopting a congressional redistricting plan and that employed by the California Supreme Court. The California Supreme Court in *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992), recognizing that there was a dispute among the circuits on whether a Voting Rights Act challenge could be brought with respect to minority influence districts, drew and adopted a plan that protected minority influence districts. The California Court accepted the responsibility for obtaining sufficient information to ensure that the plan it adopted was consistent with constitutional, statutory and case law requirements. The Pennsylvania Supreme Court, in contrast, rejected Petitioners' exception to the Master's failure to make affirmative findings that the reduction of the African-American population in the Fourteenth Congressional District would be harmless to those minority voters. Petition App. at A13.

II. THIS COURT SHOULD DECIDE WHETHER STATE COURTS MUST USE THE SAME STANDARD IN ADOPTING CONGRESSIONAL REAPPORTIONMENT PLANS AS THE FEDERAL COURTS.

State courts have become increasingly active in the reapportionment arena. In addition to the instant case, this court has, or had, before it, cases involving state court adopted plans, at a minimum, from Minnesota and New York. Nationwide, since the release of the 1990 census, state courts have been involved one way or another in congressional and/or state legislative

reapportionment in, at least, Alaska, California, Florida, Idaho, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Texas. In many of these states, concurrent litigation was ongoing in the federal district courts. There are few such cases associated with past decennial reapportionments but the large number resulting from the 1990 reapportionment portends more in the future. As when addressing constitutional challenges, state courts adopting statewide redistricting plans should be held to the same standard as federal courts in order to avoid non-uniformity in federal law. See *McKesson Corporation v. Division Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).[1]

This Court has held that when a federal district court adopts a reapportionment plan, it cannot ignore state reapportionment policy. *White v. Weiser*, 412 U.S. 783 (1973). The federal constitution, absent congressional action, leaves reapportionment to the state legislatures. U.S. Const. art. I, §2, cl. 1. In this case, the Pennsylvania Supreme Court ignored the policies contained in the previously enacted legislative plan. A federal court could not have done so.

Respondents in their brief justified the Pennsylvania Supreme Court's action by noting, correctly, that this Court has recognized that a state's highest court has the power to declare state law. This Court, however, has never decided that a state supreme court, acting in a purely judicial capacity as a court with concurrent jurisdiction over federal "one-man, one-vote" questions, can invent

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[1] In *McKesson Corporation*, 496 U.S. at 28-29, this Court explained that concurrent jurisdiction over issues of federal law is subject to its review in order to "secure state-court compliance with, and national uniformity of federal law[.]" Moreover, when addressing a federal constitutional challenge, a state court should apply the standard of review that this Court has imposed. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) ("[W]hen a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed.").

state policy considerations to justify departing from strict equality.[2] If that is what the Pennsylvania Supreme Court did, it would be a significant difference between state and federal courts because no federal court could invent policy for a state that would justify such a departure.[3] In a related case referenced in the Petition, *Nerch v. Mitchell*, No. 3:CV-92-0095 (M.D. Pa. filed August 13, 1992), a three-judge federal panel has recently held that that is precisely what the Pennsylvania Supreme Court did. Reply App. at A5-A57. The panel held that the Pennsylvania Supreme Court's declaration of public policy was "the functional equivalent of a similar legislative or constitutional declaration." Reply App. at A30.

If a state court is not bound to consider the policies contained in prior legislative enactments in redistricting cases, but federal courts are, the outcome of any redistricting lawsuit is likely to be very different depending on the forum selected by the plaintiffs. This will encourage litigation and discourage parties from seeking legislative solutions to redistricting issues. It will reward the party who strikes first with a lawsuit in the forum perceived to be most advantageous and, in the event of parallel state and federal proceedings, who can get his or her preferred forum to beat the other court to entry of judgment. This is an issue affecting federal rights of all citizens that ought to be addressed by this Court now.

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[2] A state, of course, may "allocate the lawmaking function to whatever branch of state government [it] may choose." *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. at 461 n.6. See also, *Smiley v. Holm*, 285 U.S. 355 (1932). Pennsylvania, however, has not included the Pennsylvania Supreme Court in the lawmaking function for congressional reapportionment. Pennsylvania's Constitution, unlike, for example, that of California, does not even address congressional reapportionment.

[3] Even if the Pennsylvania Supreme Court did not do this, but merely assumed that the possible justifications noted by this Court in *Karcher v. Daggett*, 462 U.S. 725 (1983), were *per se* sufficient justifications, it would be an egregious error deserving review.

III. ALL QUESTIONS RAISED BY PETITIONERS ARE PROPERLY BEFORE THIS COURT.

Respondents allege that Petitioners waived two points made in the Petition because Petitioners failed to raise these issues in the state court proceedings. The points are (1) the portion of Petitioners' second reason for granting a writ based on the Pennsylvania Supreme Court's justification of the creation of a second minority-in-the-majority district and (2) Petitioners' third reason for granting a writ based on the Pennsylvania Supreme Court's failure to defer to the policies reflected in the last legislatively enacted plan.

The nature of the state court proceeding was such that it was not necessary for Petitioners to raise these points prior to the Petition to this court. The order of the Pennsylvania Supreme Court and its opinion in support thereof were the first court decision in this case, making the Petition the first opportunity to frame issues of error. The Pennsylvania Supreme Court addressed all the federal issues raised by Petitioners in their Petition. As this Court has recognized, "[a] ruling on the merits of a federal question by the highest state court leaves the federal question open to review in [the United States Supreme Court]." *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978).

In any event, Petitioners did anticipate and bring these points to the state court's attention during the proceedings. With respect to the creation of a second minority-in-the-majority district, Petitioners excepted to the Master's recommended plan. Petition App. at 157-58. Moveover, Loeper Petitioners in Paragraph 2 of their Supplemental Exceptions to the Master's Report requested the Pennsylvania Supreme Court to remand the matter to the Master for further proceedings in which he would permit submission, amendment, and correction of errors in refinement of statewide plans and develop a record that would demonstrate that the plan adopted would protect federal constitutional and statutory rights, including rights to equal representation and minority voting rights. Reply App. at A3-A4.

Respondents are simply wrong in alleging that Petitioners never raised their third reason for granting the Petition, failure of the state court to follow *White v. Weiser*, in the state court proceedings. Petitioner Ryan raised this issue in the Memorandum of Intervenors Ryan and Cornell filed with the court subsequent to the hearings. Reply App. at A1-A2. It is also implicit in Exception No. 7 of the Exceptions of Intervenors Loeper, et al., Petition App. at A156, and it was explicitly raised by counsel for Petitioners during oral argument before the Pennsylvania Supreme Court.[4]

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[4] In accordance with normal practice, no record was made of the oral argument held March 7, 1992.

CONCLUSION

For the reasons set forth in the Petition and in this Reply, Petitioners respectfully request that the Petition be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA

ROBERT J. MELLOW, Senator, 22nd District, et al.,	:	No. 7 M.D. Misc. Dkt. 1992
Petitioners,	:	[25 M.D. 1992]
v.	:	
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth, et al.,	:	
Respondents.	:	

MEMORANDUM OF INTERVENORS RYAN AND CORNELL

. . . .

The U.S. Supreme Court in *White v. Weiser*, 412 U.S. 783, 795 (1973) stated clearly that state legislative policy should be adhered to by Federal Courts when acting on Congressional Plans. The Court said in relevant part:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment.

This Court is respectfully encouraged to adopt the concepts embodied in the Original Loeper Plan as its own expression of the best state policy for Congressional Reapportionment and to use the revisions made thereto by the Loeper Revised Plan to more closely conform it to the principle of one man one vote.

IN THE SUPREME COURT OF PENNSYLVANIA

ROBERT J. MELLOW, Senator, 22nd District, et al.,	:	
	:	No. 7 M.D. Misc. 92
Plaintiffs	:	
v.	:	
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth, et al.,	:	
Defendants	:	

SUPPLEMENTAL EXCEPTIONS OF INTERVENORS LOEPER, JUBELIRER, FISHER, LEMMOND, SALVATORE AND WENGER TO THE REPORT AND RECOMMENDATION OF THE MASTER

Intervenors F. Joseph Loeper, Robert C. Jubelirer, D. Michael Fisher, Charles Lemmond, Hank Salvatore and Noah Wenger, by their attorneys, hereby file the following supplemental exceptions to the findings, recommended decision and form of order of this Court's Master, Honorable David W. Craig, filed on February 24, 1991:

1. Intervenors filed exceptions in this matter on February 26, 1992. In their exceptions, Intervenors requested two alternatives for relief: (1) the adoption of the Loeper Amended Plan and (2) alternatively, that the court should design a plan of its own that addresses the failures of the plan recommended by the Master.

2. Intervenors desire to modify their prayer for relief to provide for another alternative, namely remand to the Master for further proceedings.

WHEREFORE, Intervenors respectfully request that the Court

(a) adopt the Loeper Amended Plan,

(b) design a plan of its own that satisfies all requirements of law, or

(c) remand this matter to the Master for further proceedings including

> (i) the submission, amendment correction, of errors and refinement of state-wide plans for congressional redistricting and
>
> (ii) providing the Court with sufficient data, in the record, to demonstrate affirmatively that any plan under consideration will protect federal constitutional and statutory rights, including rights to equal representation and minority voting rights.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHESTER NERCH, HERBERT BARNES, CLARENCE THOMPSON, JOSE HERNANDEZ, MATTHEW RYAN, F. JOSEPH LOEPER, D. MICHAEL FISHER, MICHELLE AGATSTON, LUIS CRUZ and LAWRENCE R. WATSON, II,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 3:CV-92-0095
BRENDA K. MITCHELL, Secretary of the Commonwealth of Pennsylvania, and WILLIAM BOEHM, as Commissioner of the Bureau of Commissions, Elections and Legislation, Department of State of the Commonwealth of Pennsylvania,	:	
Defendants.	:	

BEFORE: STAPLETON, *Circuit Judge*, and RAMBO and POLLAK, *District Judges*

OPINION OF THE COURT

PER CURIAM:

This case presents a challenge to the plan for congressional redistricting adopted by the Pennsylvania Supreme Court on March 10 of this year. That plan is now in force and will, unless found deficient by this court, constitute the basis for the elections to be held in November of this year, and every second November thereafter in this decade, for Pennsylvania's delegation to the United States House of Representatives. The challenge to the plan is dual: plaintiffs contend that the population discrepancies among certain of the newly delineated districts offend the constitutional principles of equality embodied in the "one-person one-vote" doctrine. Further, plaintiffs contend that the redrawn second congressional district, in Philadelphia, and fourteenth congressional district in Allegheny County (Pittsburgh and environs), will operate to reduce the voting strength of African-Americans in those districts in a manner that contravenes Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the fifteenth amendment to the United States Constitution.

I.

Throughout the 1980s, the Pennsylvania delegation in the United States House of Representatives numbered twenty-three. But, towards the end of the decade, the political truth began to sink in that twenty-three was a high-water mark from which Pennsylvania would, in the 1990s, recede. It was clear that the population of the northeastern states was becoming a progressively smaller fraction of the national population--diminishing relative to the growing populations of the south and west—and hence Pennsylvania (and New York and other large northeastern states) would lose representation in the House. The precise degree of that loss would turn on the population figures officially declared by the 1990 decennial census. The census, formally ratifying the massive demographic shifts that had been in progress for a number of years,

would dictate the apportionment of House seats among the fifty states during the last decade of the century.

On December 31, 1991, the Clerk of the House of Representatives advised the Secretary of the Commonwealth of Pennsylvania that, beginning with the 1992 elections, Pennsylvania would be entitled to only twenty-one seats in the House. And so it fell to the Pennsylvania General Assembly to perform its constitutional responsibility to redraw the congressional map of Pennsylvania, providing for twenty-one rather than twenty-three districts. Four weeks passed. The General Assembly—the Democratic-controlled House and the Republican-controlled Senate—dithered and did nothing.

On January 28, 1992—the first day on which nominating petitions could be circulated for the April 28 primary elections—eight Democratic state senators, led by Senator Robert J. Mellow, filed suit in the Pennsylvania Commonwealth Court. The suit asked that the existing regime of twenty-three congressional districts be declared unconstitutional and that, in default of General Assembly adoption of a proper twenty-one district regime, the court promulgate a valid plan. Concurrently, the Mellow plaintiffs moved the Pennsylvania Supreme Court to take jurisdiction of the case. The named defendants were Acting Secretary of the Commonwealth Brenda K. Mitchell and Commissioner William Boehm of the Commonwealth's Bureau of Commissions, Elections and Legislation.

The following day, two suits similar to the Mellow suit were filed in federal district courts seeking judicial invalidation of the existing twenty-three district regime and, in default of action by the General Assembly, judicial promulgation of a valid twenty-one district plan. One of the suits was brought in the Middle District of Pennsylvania, by Chester Nerch, Treasurer of the Lackawanna County Democratic Committee. The other suit was brought in the Eastern District of Pennsylvania by three plaintiffs: Herbert Barness, a voter in the eighth congressional district; Clarence Thompson, an African-American voter in the first congressional

district; and Jose Hernandez, an Hispanic voter in the first congressional district. The defendants in both suits were Secretary Mitchell and Commissioner Boehm.

The *Barness* suit was transferred from the Eastern District to the Middle District, the district in which Secretary Mitchell and Commissioner Boehm are officially domiciled. The *Barness* and *Nerch* suits were consolidated, and a three-judge court was convened, as is required "when an action is filed challenging the constitutionality of the apportionment of congressional districts. . . ." 28 U.S.C. § 2284(a). By agreement of the parties, the consolidated federal court actions were stayed.

On January 30, in the *Mellow* suit in the Commonwealth Court, Judge Barry (1) granted a preliminary injunction declaring unconstitutional the redistricting scheme in effect at that time and (2) directed that any proposed redistricting plans be filed in the Commonwealth Court by February 11. On February 12, President Judge Craig scheduled a hearing to begin on February 13, to consider the plans filed. On February 13, the Pennsylvania Supreme Court, acting pursuant to 42 Pa. Cons. Stat. Ann. § 726 (1981), which authorizes the Pennsylvania Supreme Court to take plenary jurisdiction of proceedings in any Pennsylvania court "involving an issue of immediate public importance," assumed jurisdiction over *Mellow*. Simultaneously, the Pennsylvania Supreme Court directed Judge Craig, sitting as a Special Master, to conduct the scheduled hearing and to submit a report by February 26.

On February 14, Representative Matthew Ryan, the Republican leader in the lower house of the General Assembly and an intervenor in the *Mellow* state court suit, filed a federal court complaint in the Middle District. The *Ryan* suit was consolidated with the stayed *Nerch* and *Barness* suits. Thereupon Representative Ryan sought to vacate the stay so that he might move in this court for a preliminary injunction halting the state court proceedings over which the Pennsylvania Supreme Court had assumed plenary jurisdiction.

We vacated the stay with a view to addressing Representative Ryan's motion for a preliminary injunction.[1] A hearing on that motion was scheduled for February 27. Meanwhile, in an amended complaint, Representative Ryan was joined by two other Republican state legislators, Senators F. Joseph Loeper and D. Michael Fisher—who, like Representative Ryan, were parties to the *Mellow* state court suit—and also by three registered voters: Michelle Agatston, an African-American voter in the fourteenth congressional district; Luis Cruz, an Hispanic voter in the first congressional district; and Lawrence R. Watson, II, an African-American voter in the second congressional district.

In a memorandum filed on February 25, this court identified the issues we thought the parties should focus on at the February 27 hearing:

> With a view to assisting the parties in preparing for the hearing on February 27, we think it may be helpful to identify what we currently see as a paramount obstacle the Ryan plaintiffs must surmount in order to establish entitlement to preliminary injunctive relief. Taking all facts stated in the motion to be true, we have difficulty perceiving that irreparable injury to a federally protected interest of any of the Ryan plaintiffs is likely to occur as a result of the Pennsylvania Supreme Court's moving forward to formulate and approve a reapportionment plan. As presently

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[1] In opposing the motion for a preliminary injunction, Secretary Mitchell and Commissioner Roehm argued that "[i]f a plan were adopted by the [Pennsylvania] Supreme Court which, as Representative Ryan fears it will, were to contravene his constitutional rights or his rights under the Federal Voting Rights Act (even though Representative Ryan is not a member of any recognized minority group), then he could immediately return to this Court to request a preliminary injunction to enjoin the defendants from proceeding with congressional elections using such an illegal plan." Answer of Defendants to Motion of Plaintiff for Relief from Stay and Expidited Hearing of Plaintiff's Motion for Preliminary Injunction, p.6.

> advised, we see no reason to doubt that the Pennsylvania Supreme Court is in a position at this point to formulate and approve such a plan substantially before this court would be able to do so, and it would appear to us to be in the public interest for a plan to be formulated and approved at the earliest possible time. If this is correct, it suggests that the appropriate action for this court is to stay its hand until the Pennsylvania Supreme Court acts. This would in turn mean that if the Pennsylvania Supreme Court approves a plan that any of the Ryan plaintiffs (who has adequate standing to raise the pertinent issue(s)) maintains is inconsistent with the Voting Rights Act and/or the Constitution, he or she would be able to file a renewed application for relief.

Meanwhile, on February 24, Judge Craig, as Special Master, filed a detailed report dealing with issues both of fact and of law. Judge Craig recommended that the Pennsylvania Supreme Court adopt a plan designated as Mellow 2, the second of two plans submitted by the Democratic plaintiff-senators who had initiated the state court suit. Judge Craig found Mellow 2 to be superior to the other plans considered, including one submitted by Senator Loeper. A plan proposed by Representative Ryan was not considered by Judge Craig on the ground that it was not submitted until February 12, a day after the February 11 deadline set by Judge Barry on January 30.

On February 27, before addressing the motion for a preliminary injunction, this court granted certain motions for intervention and remitted other would-be intervenors to *amici curiae* status. In all subsequent phases of the federal court litigation the active participants have been (1) the six Ryan plaintiffs, (2) defendants Mitchell and Boehm, (3) the eight Mellow defendant-intervenors, and (4) defendant-intervenors Democratic Representatives Harold James, Anthony Williams, Curtis Thomas and Vincent Hughes and the Philadelphia Leadership Conference

and the Frederick Douglass Society. An additional group of defendant-intervenors, Speaker of the Pennsylvania House of Representatives Robert W. O'Donnell, and two of his fellow Democratic members of the House leadership, have played a more circumscribed role—opposing the contentions of the Ryan plaintiffs and generally supportive of the positions taken by the other defendant-intervenors and by defendants Mitchell and Boehm. The original federal court plaintiffs—Nerch and the Barness group—have been quiescent since the mid-February dissolution of the stay.

At the February 27 hearing no testimony was presented. Argument was had on the questions of law posed by the Ryan plaintiffs' motion for a preliminary injunction and the defendants' and defendant-intervenors' request that we abstain. The motion for a preliminary injunction was denied and the motion to abstain was reserved.

On March 10, the Pennsylvania Supreme Court announced that it had adopted Mellow 2, the redistricting plan recommended to it by Judge Craig. On March 26, the court filed a unanimous opinion, written by Justice Papadakos, explaining its conclusions that Mellow 2 satisfies the Constitution's "one-person one-vote," mandate and that it fulfills the requirements of Section 2 of the Voting Rights Act.

On March 30, March 31, and April 1, this court heard evidence and arguments with respect to the Ryan plaintiffs' claims that Mellow 2, is unconstitutional and contravenes the Voting Rights Act. Also, defendants Mitchell and Boehm orally moved for dismissal for lack of subject-matter jurisdiction: they contended that if this court were to retain jurisdiction and inquire into the merits of the redistricting plan promulgated by the Pennsylvania Supreme Court, such an inquiry would constitute federal district court review of a decision of the highest court of a state, a form of lower federal court intervention in the state judicial process foreclosed by the so-called "*Rooker-Feldman* doctrine." Since the other parties had not had prior notice of the Mitchell-Boehm motion to dismiss, decision

on that motion was reserved. Also, argument was heard on a motion filed by the Mellow intervenors asking this court to stay its hand on grounds of "*Younger* abstention." At the close of the three-day hearing, it was agreed that, after the hearing record was transcribed, (1) the parties would file briefs addressing the merits issues and the jurisdiction and abstention issues, and (2) final argument would be had following submission of the briefs. Pursuant to these arrangements, comprehensive briefs were filed, and, on May 19, extended argument was presented.

II.

We first consider two threshold questions: (1) whether we have subject-matter jurisdiction and (2), if so, whether we should nonetheless abstain.

A. *Rooker-Feldman*

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), the Court held that a federal district court lacked jurisdiction over a suit which sought a declaration of the unenforceability, on various federal constitutional grounds, of a civil judgment rendered in a state trial court and affirmed by the state supreme court. The Court's holding appeared to be an unsurprising application of the principle, central to the mutually supportive structures of the federal and state judiciaries since 1789, that state court rulings on issues of federal law are not reviewable by any federal tribunal other than the Supreme Court of the United States on appeal from or writ of certiorari to the highest state court in which judgment can be had. "Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character." *Id.* at 416.

Rooker, decided in 1923, slept undisturbed for almost six decades. Then, after scholarly reexamination, Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 Hastings L. J. 1337 (1980), the venerable

case was cited approvingly by the Supreme Court in *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Feldman*, two candidates for admission to the District of Columbia bar brought suit in the United States District Court for the District of Columbia to challenge, on constitutional grounds, determinations by the District of Columbia Court of Appeals—the highest court in the local District of Columbia court structure--that the plaintiffs were ineligible for admission. The ineligibility arose from the plaintiffs' failure to satisfy an established admissions requirement prescribed by the District of Columbia Court of Appeals in the exercise of its statutory authority over bar membership in the District of Columbia. The requirement was that the applicant for admission be a graduate of a law school approved by the American Bar Association. One of the plaintiffs was a retired Navy pilot who had graduated from an unapproved law school. The other plaintiff had taken a number of law courses but was not a law school graduate; he was, however, admitted to practice both in Virginia and in Maryland, and he had in fact practiced law for several years. The refusal of the District of Columbia Court of Appeals to waive its rule in these two instances was challenged, on constitutional grounds, in the United States District Court for the District of Columbia. That court dismissed on jurisdictional grounds: "the admission and exclusion of attorneys by the highest court of a state is the exercise of a judicial function which may be reviewed only by the United States Supreme Court." The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the two decisions of the District of Columbia Court of Appeals not to waive its rule at plaintiffs' behest "were not judicial in the federal sense, and thus did not foreclose litigation of the constitutional contentions in the District Court." *Feldman v. Gardner*, 661 F. 2d 1295, 1298 (D.C. Cir. 1981). The Supreme Court, speaking through Justice Brennan, reversed, agreeing with the district court that each of the two District of Columbia Court of Appeals non-waiver decisions was "a judicial proceeding." 460 U.S. at 481. And "[r]eview of such determinations can be obtained only in this Court. See 28 U.S.C. § 1257. See also *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 296 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416 (1923)." 460 U.S. at

476. Thus did *Rooker*'s platitude become the "*Rooker-Feldman* doctrine." Justice Brennan's opinion was, however, at pains to define the limits of the Court's holding: although the district court lacked jurisdiction to entertain challenges to the rule *as applied*, the district court had jurisdiction to entertain challenges to the rule *as adopted*, because the adoption of a bar admission rule did not appear to be a judicial proceeding. *Id.* at 486. *Cf.* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (3d. ed. 1988) 1632-38.

Defendants Mitchell and Boehm argue that, if this court proceeds to examine the constitutionality of the Pennsylvania Supreme Court plan, it will be pursuing exactly the course—review of a decision of the highest court of a state—that *Rooker-Feldman* bars district courts from undertaking and remits to the exclusive authority of the Supreme Court of the United States.

It is true that the Pennsylvania Supreme Court measured Mellow 2 against the "one-person one-vote" requirement and found that it passed muster. And it is also true that the Pennsylvania Supreme Court, in a section of its opinion captioned "Section 2 of the Voting Rights Act," announced that it agreed with Judge Craig that Mellow 2 "best protected minority voting rights." *Mellow v. Mitchell*, 607 A.2d 204, 208-210 (Pa. 1992). Further, it is true that the Pennsylvania Supreme Court went on specifically to find that: (1) Mellow 2 "did *not* effectively dilute minority voting strength in the Second Congressional District," *id.* at 208 (emphasis in original); (2) "all plans except [Mellow 2] *did* dilute minority voting strength in the First Congressional District," *id.* (emphasis in original); and (3) with respect to the fourteenth congressional district, "[n]either the Loeper intervenors nor anyone else has offered any evidence regarding the degree of influence presently enjoyed by minority voters in Allegheny County, much less any evidence that such influence would be impaired by the small reduction [from 23% to 17.81%] in the African-American percentage in a district that already has a relatively small African-American population." *Id.* at 210 n.3. Moreover, we agree with defendants Mitchell and Boehm that the decision of the

Pennsylvania Supreme Court, reflected in its carefully crafted opinion, was a *judicial* act—not, as the Ryan plaintiffs contend, a *legislative* act outside the rubric of *Rooker-Feldman*.

However, in one major respect the situation at bar is unlike the situation presented in *Rooker* and in *Feldman*. Both in *Rooker* and in *Feldman* the party seeking to invoke district court jurisdiction had participated—and had lost—in the prior proceeding sought to be circumvented, or to be collaterally attacked, in the district court. In the situation at bar, certain of the Ryan Plaintiffs—Representative Ryan, and Senators Loeper and Fisher—were parties to the state court litigation; but others—Ms. Agatston and Messrs. Cruz and Watson—were not.

As the Court of Appeals for the Third Circuit recently observed in a very similar setting:

> [T]he *Rooker-Feldman* doctrine has a close affinity to the principles embodied in the legal concepts of claim and issue preclusion. *See* Wright, Miller & Cooper *[Federal Practice and Procedure]*, § 4469 at 668 ("Although no substantial harm seems to have been done by the jurisdictional cases, it would be better to go straight to the res judicata rules that justify preclusion"). The basic premise of preclusion is that non-parties to a prior action are not bound. . . .
>
> We have found no authority which would extend the *Rooker-Feldman* doctrine to persons not parties to the proceedings before the state supreme court and are referred to none.

Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992).[2]

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[2] The *Valenti* excerpt from the Wright & Miller treatise on federal practice and procedure is taken from a longer discussion which warrants quotation (§ 4469 at pp. 663-68, footnotes omitted):

> Many decisions, drawing from Rooker v. Fidelity Trust Co., have transformed res judicata doctrine into a rule that lower federal courts lack jurisdiction to review state courts. The Rooker case itself was framed as a bill in equity for relief from a state court judgment that was claimed to violate the contract clause, the due process clause, and other federal prohibitions. The Court's opinion makes it clear that it could not find any ground for collateral attack on the judgment—it found the bill to be "merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of" full state court jurisdiction. It also stated, however, that "[u]nder the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors" of constitutional law. This jurisdictional transmutation of res judicata doctrine seems entirely unnecessary. To be sure, it seems elementary that the statutes giving the Supreme Court jurisdiction to review state court judgments should be read with the statutes conferring original jurisdiction on lower federal courts to establish that direct review of state courts can be had only in the Supreme Court. The rare cases that are expressly framed as an appeal from a state court to a lover federal court may reasonably be dismissed for lack of jurisdiction. Most of the cases, however, involve some form of direct attack on the state judgment or involve simple redundant litigation. For these cases, jurisdictional doctrine seems unnecessary and potentially mischievous. Some courts that have noted the jurisdictional doctrine have indicated a preference for res judicata or other grounds of decision. The doctrine has never been expanded to the logical corollary that as between two federal district courts res judicata is a matter of jurisdiction, since exclusive jurisdiction for appellate review lies in the courts of appeals. A jurisdictional approach is an open invitation to apply federal rules of preclusion without careful thought as to the content of state rules or any possible justifications for ignoring them. Jurisdictional perspectives might expand the

On the face of the record, it would therefore appear that, while *Rooker-Feldman* precludes our consideration of the claims of Representative Ryan and Senators Loeper and Fisher, it is no bar to our consideration of the claims of Ms. Agatston, Mr. Cruz and Mr. Watson.

Defendants Mitchell and Boehm argue, however, that Ms. Agatston and Messrs. Cruz and Watson should be treated as "in privity" with Messrs. Ryan, Loeper and Fisher and hence bound by the Pennsylvania Supreme Court ruling and foreclosed from litigating in this court by *Rooker-Feldman*. But the claim of "privity" appears, on examination, to be nothing more than an allegation that Ms. Agatston and Messrs. Cruz and Watson are of the same political persuasion—Republican—as Messrs. Ryan, Loeper and Fisher, and closely tied to their political interests. Nothing in the record suggests that there was any bad faith or other disingenuity attendant on the non-participation of Ms. Agatston and Messrs. Cruz and Watson in the state court litigation. "A non-party is not precluded from relitigating matters decided in a prior action simply because it passed by an opportunity to intervene." *Valenti*, 962 F.2d at 297.

To bolster their argument that Ms. Agatston and Messrs. Cruz and Watson should be regarded as bound by the state court judgment, defendants Mitchell and Boehm contend that Ms. Agatston and Messrs. Cruz and Mitchell [sic] had standing to

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> number of persons affected by a judgment, and cause confusion as to the effects of dismissing the federal action. Any possible advantage in the doctrine that jurisdictional questions can be raised sua sponte can be parallelled by the power to raise res judicata sua sponte. Even in the special case in which the Supreme Court has dismissed an appeal from the state judgment for want of a substantial federal question, it is better to rely on the res judicata effects of the Supreme Court's decision than to invoke a jurisdictional doctrine. Although no substantial harm seems to have been done by the jurisdictional cases, it would be better to go straight to the res judicata rules that justify preclusion.

petition the Supreme Court of the United States for a writ of certiorari to the Pennsylvania Supreme Court. But, on oral argument before this court, defendants Mitchell and Boehm were not able to cite authority for the proposition that non-parties to a state court proceeding have standing to petition for certiorari. May 19, 1992 Oral Arg. Tr., at 57-9. The point has an importance that connects with, but also transcends, the res judicata question. As already noted, the basic significance of *Rooker-Feldman* is that it underscores the central architectural theme of American jurisprudence that decisions of the highest court of a state on issues of federal law are reviewable only by the Supreme Court of the United States. But in the present circumstance it is not apparent that *any* litigant before the Pennsylvania Supreme Court was positioned to challenge before the Supreme Court of the United States that portion of the decision of the Pennsylvania Supreme Court holding that the second and fourteenth congressional districts, as projected in Mellow 2, comport with Section 2 of the Voting Rights Act. Our examination of Judge Craig's and Justice Papadakos' opinions reveals no African-American litigant who, as a voter in either the second or fourteenth congressional district, was challenging Mellow 2 on that ground in the Pennsylvania Supreme Court.[3] To that extent, therefore, a timely petition for certiorari to the Pennsylvania Supreme Court, had one been filed,[4] could not have brought before the Supreme Court of the United States the full range of issues presented to this court.

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[3] The Pennsylvania Supreme Court also discussed the impact of redistricting in the first congressional district, concluding that Mellow 2 enhanced African-American voting strength more than any other plan the court considered. We know of no African-American voter from the First Congressional District contesting that finding in the state proceeding. In this court, we think that Mr. Cruz—an Hispanic voter in the first congressional district—lacks standing to press the issue of the adequacy of African-American voting strength in the first congressional district.

[4] It is our understanding that the date by which a certiorari petition would have to have been filed was June 8, 1992, and that no petition had in fact been filed by that date.

We conclude that the three Ryan plaintiffs not parties to the state court litigation are not in privity with Representative Ryan and Senators Loeper and Fisher. Accordingly, while *Rooker-Feldman* does signify that the Ryan, Loeper and Fisher claims are not cognizable, it is no bar to the Agatston, Cruz and Watson claims.[5] We also conclude that all three of these plaintiffs have standing to challenge the conformity of the Pennsylvania Supreme Court plan with "one-person one-vote." Moreover, Ms. Agatston, as an African-American voter in the projected fourteenth congressional district, has standing to challenge the alleged dilution of African-American voting strength in that district; similarly, Mr. Watson, as an African-American voter in the projected second congressional district, has standing to challenge the alleged dilution of African-American voting strength in that district.

B. *Younger* Abstention

The Mellow defendant-intervenors contend that, pursuant to the principles of abstention first enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), and elaborated in subsequent cases, it is this court's duty to stay its hand, given that a previously begun state court proceeding involving important state interests constituted an adequate vehicle for addressing whatever federal constitutional issues the Ryan plaintiffs have raised in this court.

Younger v. Harris was, in its inception, an elaborately magisterial statement of what was, conceptually, a relatively modest

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[5] *See* May 19, 1992 Oral Arg. Tr. at 57:

> JUDGE STAPLETON: So unless we find all of the plaintiffs in privity, you lose this argument?
>
> MR. DUNLAP: I do. I do, unless there is a privity argument—I lose the argument on Rooker-Feldman. Only—if the three minority plaintiffs in this case are not in privity with the three plaintiffs who concededly were in the state court, then under *Valenti* I don't think I can win.

doctrinal demarche. As the Court put the matter in *Samuels v. Mackell*, 401 U.S. 66, 69 (1971), one of *Younger*'s companion cases, "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations where necessary to prevent immediate irreparable injury." In later cases, *Younger* outgrew its beginnings. In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), the Court, speaking through Chief Justice Burger, declared:

> The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. . . . "[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. . . ."

Id. at 432 (quoting *Gibson v. Berryhill*, 411 U.S. 564 (1973)).

There is no doubt that important state interests, involving every resident of the Commonwealth, are involved in the process of congressional redistricting. The magnitude and scope of those interests are matched only by the magnitude and scope of the federal interests in assuring full compliance with federal constitutional and statutory norms. As we have had occasion to point out, the Pennsylvania Supreme Court's opinion addressed not only the constitutional "one-person one-vote" issues, but also the Voting Rights Act issues which, because under the supremacy clause federal statutes are paramount to state law, are themselves matters of constitutional dimension. But when we inquire, as *Middlesex* instructs, "whether the state proceedings afford an adequate opportunity to raise the constitutional claims," 457 U.S. at 432, we conclude that the answer is in the negative. The answer is in the negative because, as we have noted in our discussion of *Rooker-Feldman*, there apparently was no party to the state court proceedings who would have had standing to seek review by the Supreme Court of the United States of the Pennsylvania Supreme Court's rulings on the Voting Rights Act questions. To that extent,

an essential predicate of *Younger*—that state courts are, as a general matter, as competent as federal courts to address federal claims subject to ultimate review by the Supreme Court—is, in this instance, unfulfilled, because, if certiorari to the Pennsylvania Supreme Court had been sought, the Supreme Court of the United States would have had truncated revisory authority. Accordingly, we conclude that *Younger* abstention would be inappropriate in this case.[6]

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[6] Whether, in any event, congressional redistricting cases lie outside the *Younger* framework is a question which, in view of our determination that the ingredients of *Younger* are not present in this case, we need not address. Only one instance of *Younger* abstention in a congressional redistricting case has come to our attention. *Members of the California Democratic Congressional Delegation v. March Fong Eu*, 1992 U.S. Dist. LEXIS 5737 (N.D. Cal., March 3, 1992). In that case the three-judge court was divided: Judge Tang filed a strong dissent to Judge Legge's opinion of dismissal.

We also need not consider whether abstention would have been compatible with our stance in denying the Ryan plaintiffs' motion for a preliminary injunction against the state court proceedings. Denial of the motion presupposed that the Ryan plaintiffs could return to this court if unsatisfied with the action of the Pennsylvania Supreme Court. *See* note 1, *supra*, and following text.

III.

We now turn to the Ryan plaintiffs' argument that the redistricting[7] plan adopted by the Pennsylvania Supreme Court is unconstitutional.

A.

Art. I, § 2 of the Constitution of the United States provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

In a line of cases dating from the 1960s, the Supreme Court has interpreted the Constitution's mandate that representatives be elected "by the People of the several States" to require that every vote cast in a congressional election be, "as nearly as practicable," equal to every other. *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964).

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[7] Although the terms "reapportionment" and "redistricting" have frequently been used interchangeably, technically this case deals with redistricting. *See Davis v. Bandemer*, 478 U.S. 109, 161 n.1 (1986) (Powell, J., concurring in part, dissenting in part) ("Technically, the words 'apportionment,' and 'reapportionment' apply to the 'allocation of a finite number of representatives among a fixed number of pre-established areas,' while 'districting' and'redistricting' [sic] refer to the drawing of district lines"). After the census, the President receives the relevant data from the Secretary of Commerce, "reapportions" the 435 house seats among the states, and sends a statement to Congress outlining the reapportionment. *Franklin v. Massachusetts*, 60 U.S.L.W. 4781 (U.S. June 26, 1992). The Clerk of the United States House of Representatives then informs each of the states of the number of representatives to which it is entitled. At that point, those states that are entitled to more than one representative proceed to "redistrict" their states to take into account shifts in population and, potentially, any increase or decrease in the number of congressional districts.

See also Karcher v. Daggett, 462 U.S. 725 (1983); *White v. Weiser*, 412 U.S. 783 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).[8] In other words, when tackling redistricting problems, state legislatures[9] are to strive for absolute mathematical equality in population among congressional districts. The courts and commentators have widely referred to this standard as the "one-person one-vote" rule. *See, e.g., Wesberry*, 376 U.S. at 18 (Clark, J., concurring in part, dissenting in part).

The Court's decisions following *Wesberry* have steadfastly refused to interpret the one-person one-vote standard as anything but a call to mathematical exactness. For instance, in *Kirkpatrick*, the Court rejected Missouri's invitation to fix some level of population deviation among districts small enough to be considered *de minimis* and therefore automatically constitutional. *Kirkpatrick*, 394 U.S. at 530. Moreover, in *Karcher*, the Court refused to conclude that maximum population deviations smaller than the predictable undercount in census data are beyond judicial scrutiny. *Karcher*, 462 U.S. at 731. These cases demonstrate that mathematical equality in redistricting remains the lodestar--there are no *de minimis* deviations.

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[8] Some members of the Court have preferred to analyze congressional redistricting cases under the same standard as legislative reapportionment cases, i.e., the equal protection clause of the fourteenth amendment. *See Karcher*, 462 U.S. at 747 (Stevens, J., concurring) ("Even if Art. I, §2, were wholly disregarded, the "one person, one vote" rule would unquestionably apply to action by state officials defining congressional districts just as it does to state action defining state legislative districts [through the Equal Protection Clause."); *Wesberry*, 376 U.S. at 19 (Clark, J., concurring in part, dissenting in part) (same); *Colgrove v. Green*, 328 U.S. 549, 569 (1946) (Black, J., dissenting) (same). Other members of the Court have found nothing in the Constitution to support this principle. *See, e.g., Wesberry*, 376 U.S. at 20 (Harlan, J., dissenting).

[9] Of course, the state and federal courts are also subject to this standard when, as all too often is the case, the task of formulating a constitutional redistricting plan falls on the shoulders of the judiciary.

The Court has based its adherence to the "unusual rigor of th[is] standard," *id.* at 732, on two grounds. First, "[i]f state legislators knew that a certain *de minimis* level of population differences was acceptable, they would doubtless strive to achieve that level . . . ." *Id.* at 731. Accordingly, because the Constitution requires that plan drafters endeavor to attain some level of arithmetic exactness, it might as well be equality rather than something less than equality. Second, as census-taking techniques and computer technology continue to improve by leaps and bounds, attaining the ideal of population equality is more and more possible. *Id.* at 731. This reasoning recognizes the fact that although the ten years between each round of redistricting is merely half of a generation in human terms, the same period represents several generations of computer software. Therefore, the rigor of the "as nearly as practicable" standard necessarily takes into account the fact of modern life that the impossibility of yesterday may be the "practicability" of today.[10]

The current round of cases demonstrates that the computer technology associated with this task of redistricting has reached the point predicted by Justice Fortas in his concurring opinion in *Kirkpatrick*. It is now apparently possible for computer generated redistricting plans to "run[] the congressional district line down the middle of the corridor of an apartment house or even divide the residents of a single family house between two districts."

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[10] Two opinions of Justice White in this area separated by fourteen years demonstrate the wisdom of crafting a standard that responds to changes in technology. *Compare Wells v. Rockefeller*, 394 U.S. 542, 553 (1969) (White, J., dissenting) ("As a rule of thumb, a variation between the largest and smallest district of no more than 10% to 15% would satisfy me, absent quite unusual circumstances not present in any of these cases. At the very least, at this trivial level, I would be willing to view state Explanations of the variance with a more tolerant eye.") *with Karcher*, 462 U.S. at 782 (White, J., dissenting) ("Although I am not wedded to a precise figure, in light of the current range of population deviations, a 5% cutoff appears reasonable. I would not entertain judicial challenges, absent extraordinary circumstances, where the maximum deviation is less than 5%. Somewhat greater deviations, if rationally related to an important state interest, may also be permissible.")

Kirkpatrick, 394 U.S. at 538 (Fortas, J., concurring). *See, e.g. Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 644 (N.D.Ill. 1991) ("Of the 20 proposed congressional districts in the *Hastert* Plan, 18 contain the ideal population of 571,530. The remaining two districts have populations of 571,531."); *see also* Plaintiffs' Ex. #12 (purporting to divide state of Pennsylvania into 11 districts containing 565,793 people and 10 districts containing 565,792).[11]

The advent of such technology combined with the rigor of the standard, however, does not signal the end of judicial review of state redistricting. The analysis of proposed redistricting plans is not a wholly mechanical undertaking, where the plan with the lowest deviation from the ideal wins no questions asked. Proof of the existence of a plan with lower deviations merely satisfies the plaintiff's prima facie case. The Supreme Court in *Karcher* stated:

> [T]wo basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw district lines of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant

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[11] Because under the current census figures, the total population of the Commonwealth of Pennsylvania is not evenly divisible by the number of House seats allotted to the Commonwealth, only Solomon is wise enough to create a redistricting plan with zero deviation.

variance between districts was necessary to achieve some legitimate goal.

Karcher, 462 U.S. at 730-31. Clearly, then, once a plaintiff comes forward with credible evidence that the overall deviations in the plan proffered by the state could be reduced, the burden shifts to the state to justify the deviations in its plan by reference to legitimate state interests furthered by the deviation.

The Court went on in *Karcher* to enumerate several legitimate goals other than population equality that a state might pursue in redistricting. "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Id.* at 740.[12] Moreover, while a state must justify each specific deviation rather than relying upon general assertions, the burden on the state is flexible—i.e., the larger the deviation, the heavier the burden of justification. *Id.* at 741.

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[12] This holding of *Karcher* that a state has the opportunity to rebut the plaintiff's prima facie case by justifying the deviations in its redistricting plan apparently overrules statements made in the Court's earlier redistricting cases. *See Kirkpatrick*, 394 U.S. at 533-34 ("[W]e do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries."); *Mahan v. Howell*, 410 U.S. 315, 341 (1973) (Brennan, J., concurring in part, dissenting in part) ("[T]he need to preserve the integrity of political subdivisions as political subdivisions may, in some instances, justify small variations in the population of districts from which state legislators are elected. But that interest can hardly be asserted in justification of malapportioned congressional districts."); *see also Karcher*, 462 U.S. at 778-780 (White, J., dissenting). *Cf. White v. Weiser*, 412 U.S. 783, 795-97 (1973) (In remedy phase, court must follow the policies and preferences of the state, "whenever adherence to state policy does not detract from the requirements of the Federal Constitution.")

B.

With this above understanding of the law of redistricting in mind, we now proceed to apply this understanding to the challenged plan adopted by the Pennsylvania Supreme Court. The plan divides the total population of the Commonwealth, 11,881,643 people, into twenty-one congressional districts of varying sizes. The ideal population of any district is 565,793 people. The following chart, reflecting the congressional districts as established in the Pennsylvania Supreme Court plan, shows the total population of each district and the deviation from the ideal in both numbers of people and percentage of population.

Cong. District	Population	Deviation	% Deviation
District 1	565,768	-25	-0.0044%
District 2	565,815	+22	0.0039%
District 3	565,775	-18	-0.0032%
District 4	565,792	-1	-0.0002%
District 5	565,813	+20	0.0035%
District 6	565,786	-7	-0.0012%
District 7	565,760	-33	-0.0058%
District 8	565,787	-6	-0.0011%
District 9	565,803	+10	0.0018%
District 10	565,796	+3	0.0005%
District 11	565,798	+5	0.0009%
District 12	565,794	+1	0.0002%
District 13	565,767	-26	-0.0046%
District 14	565,787	-6	-0.0011%

District 15	565,810	+17	0.0030%
District 16	565,798	+5	0.0009%
District 17	565,817	+24	0.0042%
District 18	565,781	-12	-0.0021%
District 19	565,779	-14	-0.0025%
District 20	565,815	+22	0.0039%
District 21	565,802	+9	0.0016%

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[13] The numbers contained in the table are in two ways different from those contained in the appendix to the Pennsylvania Supreme Court's opinion in this matter. First, the supreme court appendix listed the total population of the new first congressional district as 565,802 rather than 565,768. If the former is correct, the first district would be 9 people over the ideal rather than 25 people under. However, other papers submitted by the parties, e.g., defendant's exhibit #1 and Attachment A to plaintiffs' post-trial brief, list the population of the first district as that listed in the above chart. We have concluded that the number set out in the chart is correct and that the population listed in the supreme court opinion is a typographical error. Otherwise, the supreme court plan accounts for a greater total population for the Commonwealth than that reported by the Census Bureau.

The second difference between the chart and the Pennsylvania Supreme Court opinion is the shift of one census block consisting of 6 people between the seventh and sixteenth congressional districts. This problem apparently arises because part of Birmingham Township in Chester County is discontiguous from the rest of the township because it is split by a waterway. Although the legal description in the Pennsylvania Supreme Court opinion included this block in the sixteenth district, the population figures for the two districts did not reflect this correction. After an initial misunderstanding, the parties agreed at trial that the census block in question was properly considered part of the sixteenth congressional district. Therefore, the numbers in the above chart reflect the addition of those six people in the sixteenth district and their subtraction from the seventh district.

The maximum deviation of this plan is 0.01007%.[14] The average deviation is 13.62 people per district or 0.00241%.

This court ruled during the course of these proceedings, and the defendants conceded in their brief and at oral argument, that the plaintiffs presented sufficient evidence to meet their prima facie case. *See* Trial Tr. at 83; May 19, 1992 Oral Arg. Tr. at 29. The plaintiffs introduced several plans with lower population deviations than those contained in the Pennsylvania Supreme Court plan. Courts have widely concluded that this type of evidence is sufficient to shift the burden to the defendants to justify the deviations. *See, e.g., Karcher*, 462 U.S. at 739 n.10; *Stone v. Hechler*, 782 F. Supp. 1116, 1125 (N.D. W.Va. 1992).

The defendants advanced two justifications for the deviations contained in the Pennsylvania Supreme Court plan. The first justification was the desire to create two minority-in-the majority-districts in Philadelphia in order to comply with the Voting Rights Act. As noted in significant detail below, the first and second congressional districts were drawn with this goal in mind. The importance of this decision for present purposes, however, is that drawing these districts in this manner had a "ripple effect" in the surrounding congressional districts. *See* Trial Tr. at 457. Accordingly, the three congressional districts surrounding the City of Philadelphia, the seventh, thirteenth, and eighth congressional districts, are all below the ideal population.

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[14] The maximum deviation is derived by adding the absolute value of the population deviation of the smallest district to the absolute value of the population deviation in the largest district and dividing that sum by the population of the ideal district. In the supreme court plan, the seventh congressional district is the smallest, 33 people under the ideal. The seventeenth district is the largest, 24 people over the ideal. The sum, 57, divided by the ideal district population of 565,793 yields the maximum deviation—0.01007%. The maximum deviation of the supreme court plan was affected by the switch of the one census block referred to in note 7. Therefore, the maximum deviation of 0.0111% referred to in the supreme court opinion is actually minutely lower.

The second, and more pervasive justification for the deviations in the Pennsylvania Supreme Court plan was the desire to avoid splitting municipalities between two congressional districts. As an initial matter, the plaintiffs argue that the defendants have failed to prove that avoidance of municipal splits is actually a legitimate interest of the Commonwealth. They argue that *Karcher* merely identified avoiding municipal splits as a *potential* state interest that *might* justify deviations but that the defendants have failed to prove that it is actually a policy of the Commonwealth. The plaintiffs note in this regard that unlike other states, Pennsylvania has not expressed its interest to avoid municipal splits in its constitution or through legislation.

The constitution and statutes of Pennsylvania are not the only sources of public policy for the Commonwealth. Redistricting plans cannot be drafted without criteria to guide the drafters and, in the absence of criteria provided by statute or the constitution, the Supreme Court of Pennsylvania had no choice but to conclude that it was authorized to establish those criteria. This conclusion is a matter of Pennsylvania state law and we are bound by it. Exercising this state-law derived authority, the Pennsylvania Supreme Court identified in its opinion the avoidance of municipal splits as an important public policy of the Commonwealth. *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992). Nothing more need be said; we accept this declaration of public policy as the functional equivalent of a similar legislative or constitutional declaration.

There remains, however, the question whether this policy was consistently applied and adequately justifies the deviations in the Supreme Court plan. The defendants presented the testimony of Mark McKillop in order to meet their burden on this issue. Mr. McKillop is a member of the staff of Senator Robert J. Mellow and was responsible for drafting the plan which eventually was adopted by the Pennsylvania Supreme Court. In each and every situation

where a district contained more than the ideal population,[15] Mr. McKillop testified that the deviations could have been reduced but only by introducing more municipal splits.[16] The defendants rely on this testimony as sufficient justification for each deviation.

The plaintiffs attack the defendants' justification evidence on two grounds. First, they refer to Mr. McKillop's testimony that the Pennsylvania Supreme Court plan splits no municipalities in the western half of the state. This fact demonstrates, the plaintiffs argue, that the policy against splitting municipalities was not consistently applied as required by *Karcher*. We are not persuaded. Western Pennsylvania is far less populated than the eastern half of the Commonwealth and drawing district boundaries without splitting municipalities is, therefore, significantly more feasible in the west. In this context, at least, it is a non sequitur to argue that the absence of a breach of a municipal boundary in Western Pennsylvania indicates that the policy against such breaches was an inconsistently applied pretext.

The plaintiffs' second attack, while more sophisticated, is no more persuasive. The plaintiffs introduced the testimony of their own mapmaker, James D'Innocenzo. Mr. D'Innocenzo, an

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[15] For ease of analysis, we will discuss Mr. McKillop's testimony only as it relates to the districts that contain more than the ideal population. Residents of districts with greater than the ideal population are the only residents of the Commonwealth who can claim that their votes are diluted because of the redistricting scheme. Moreover, every deviation in a district with a population above the ideal is obviously related to the deviation in a neighboring district below the ideal. In other words, by justifying the deviations in districts above the ideal, the defendants are necessarily justifying all other deviations.

[16] In each case Mr. McKillop testified that the deviations could be lowered by introducing municipal splits: fifth district - Trial Tr. at 461; ninth district - Trial Tr. at 583; tenth district - Trial Tr. at 584; eleventh district - Trial Tr. at 585; fifteenth district - Trial Tr. at 458; sixteenth district - Trial Tr. at 458; seventeenth district - Trial Tr. at 460; twentieth district - Trial Tr. at 459; twenty-first district - Trial Tr. at 459.

employee of the Pennsylvania Senate Republican Caucus, testified that by manipulating the boundary between the sixteenth and seventeenth congressional districts in Lancaster County, and shifting 29,000 people between the two, he could reduce the maximum deviation of the entire plan without creating additional municipal splits. As a result, the seventeenth congressional district would no longer be the largest district with 24 people more than the ideal; rather, the twentieth, with 22 people more than the ideal, would be the largest. Further, the difference between the largest and smallest districts would be 55 instead of 57, and the maximum deviation would be 0.00972% instead of 0.01007%.

Contrary to plaintiffs' suggestion we do not think the mathematical exactness standard of *Karcher* and *Kirkpatrick* supports this argument. This is not a case presenting the issue of whether a very small, unjustified maximum deviation renders a redistricting plan constitutionally infirm. This is a case in which a state has made a good faith decision to accept a very small departure from the ideal in order to serve an important countervailing interest. Where a court is convinced that any deviations from the ideal in fact resulted from an attempt to serve that countervailing interest, it need not find the plan constitutionally invalid simply because someone else, using the same criteria, manages to think of an alternative that will reduce the maximum deviation by 35-one hundred thousandths of a percentage point.

The *Karcher* Court indicated that when the burden passes to the state to justify deviations, its "legitimate goal" must be shown to justify each "*significant* variance." *Karcher*, 462 U.S. at 730-31 (emphasis added). We are satisfied that the Pennsylvania Supreme Court's plan represents a good faith effort to serve the two legitimate and important countervailing interests it identified—the creation of a second "minority-in-the-majority" district, and the avoidance of municipal splits—without causing any significant dilution in the vote of any citizen. Accordingly, we refuse to find

that plan constitutionally infirm because the maximum deviation could be reduced to a degree having no practical significance.[17]

In sum, we hold that the defendants have sufficiently justified each deviation in the Pennsylvania Supreme Court plan. Therefore, the plan does not run afoul of the one-person one-vote requirement of Art. I, § 2.

IV.

Finally, we address plaintiffs' claims under § 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("VRA") and the fifteenth amendment.

A. The Voting Rights Act

The plaintiffs assert that the Pennsylvania Supreme Court plan violates § 2 of the Voting Rights Act because it decreases African-American political power in two of the proposed districts: the fourteenth congressional district, which encompasses the city of Pittsburgh and some of its northern and western suburbs, and the second congressional district, which lies within the City of Philadelphia.

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[17] Even if computer gymnastics of this sort could establish constitutional infirmity, we would refuse to find infirmity on the facts of this case. Mr. D'Innocenzo switched populations between the sixteenth and seventeenth districts, both of which already contained greater populations than the ideal. Therefore, while votes in the seventeenth district may have been worth marginally more after his adjustment, votes in the sixteenth district would have been diluted further than they already were. Thus, that adjustment did not reduce the maximum deviation by taking voting power from voters theoretically having more than their share and redistributing it to those who theoretically had less than their share. We are aware of no authority requiring the Commonwealth to take such measures in order to produce a constitutional redistricting plan.

Section 2 of the Voting Rights Act, as amended in 1982, reads:[18]

> **Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973(f)(2)], as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their

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[18] In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Supreme Court held that, to prove a violation of the fifteenth amendment, a plaintiff must show discriminatory intent on the part of the defendants. In response, Congress amended § 2 of the VRA to make it clear that a showing of such intent was not necessary to prevail under the statute, and that the disparate impact test of *White v. Regester*, 412 U.S. 755 (1973) should apply. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 27, *reprinted in* 1982 U.S.C.C.A.N. 177, 204; *see also Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

> choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(2). Thus, § 2 may be violated by either intentionally discriminatory conduct or through facially neutral standards which have a disparate impact on minority voters.

The disparate impact prong employs a "results test" which looks at the totality of circumstances to determine whether "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice." *Chisom v. Roemer*, 111 S. Ct. 2354, 2364 (1991) (citing S. Rep. No. 417, 97th Cong., 2d Sess. 27, *reprinted in* 1982 U.S.C.C.A.N. 177, 204).

The Senate Report which accompanied the 1982 amendment to § 2 offers a number of factors for consideration in determining whether a voting standard, practice, or procedure is illegal:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, antisingle shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating Process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;[114]

6. whether political campaigns have been characterized by overt or subtle racial appeal;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

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[114] The courts have recognized that disproportionate educational employment [sic], income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of African American participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparage socio-economic status and the depressed level of political participation. [citations omitted].

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. The Senate Report also identified two additional factors which may have some relevance in divining the existence of a § 2 violation depending on the circumstances of the individual case:

- whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

- whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29, 1982 U.S.C.C.A.N. at 207.

None of these factors is dispositive, nor is any one to be given any more weight than the others. Other factors may also be given consideration. *Id.* at 28-29, 1982 U.S.C.C.A.N. at 206-07.

The retrogression of the number of minority members in a given district, as has taken place in both districts at issue here, has been held in the past to be a violation of § 2 in certain circumstances. *See, e.g., City of Port Arthur v. United States*, 459 U.S. 159, 165 (1982) ("the right to vote may be denied by dilution or debasement just as effectively as by wholly prohibiting the franchise"); *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (viewed against background of past discrimination, boundaries of Louisiana parish which were redrawn so that minority voters were split between districts declared violative of VRA); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 143, 149 (5th Cir.) (*en banc*) (reapportionment plan for county offices which fragmented compact group of minority voters into different districts disapproved), *cert. denied*, 434 U.S. 968 (1977); *Buskey v. Oliver*, 565 F. Supp. 1473, 1483-85 (M.D. Ala. 1983) (ordinance redrawing city council lines held invalid for diluting African-American votes).

We now turn to the plaintiffs' claims as they relate to each district in turn.

1. The Fourteenth Congressional District

Plaintiffs' first claim under the VRA concerns the fourteenth congressional district. Testimony adduced at trial established that, as configured under the 1982 redistricting plan, this district consisted of the City of Pittsburgh and a number of the

urban communities just east of the city but within Allegheny county. Under the 1982 plan, the percentage of African-Americans living in the district was 23.860%; under the plan adopted by the Pennsylvania Supreme Court, the percentage would be 17.811%, a drop of approximately 25%.

In the discussion which follows, we first consider whether the proposed change in the composition of the fourteenth congressional district reflects intentionally discriminatory conduct. Next we consider whether the proposed change can be expected to have discriminatory effects on minority voters in the fourteenth congressional district that are cognizable under the Voting Rights Act.

a. Allegations of Intent

At the outset, we stress that the plaintiffs have tendered absolutely no evidence of historical discrimination against African-Americans, racially polarized elections, or voting practices or procedures calculated to exclude African-Americans from participation in the political process in Allegheny County.[19] We do not see this silence as rebuttal of plaintiffs' claims, but simply note it as demonstrative of relevant areas of inquiry in which plaintiffs have failed to carry their burden of proof.

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[19] In their Post-trial Brief, the plaintiffs make the statement that the African-American communities in the City of Pittsburgh, the nearby eastern suburbs, and the former steelmaking communities of the Monongahela River valley are socially, educationally, and economically disadvantaged. This disadvantage, they state, is "sufficient to establish that the members of a minority community have less opportunity than other members of the electorate to participate in the political process and to elect a candidate of their choice." Brief at 59 (citing *Emison v. Growe*, 782 F. Supp. 427 (D. Minn. 1992)). We place very little weight on this assertion, however, as there was virtually no evidence presented which would tie any of these alleged disadvantages in those communities to voting patterns. Essentially what the court was presented with was a bald factual assertion and then a bald conclusion.

The plaintiffs concentrate instead on the fact that the Pennsylvania Supreme Court plan results in a retrogression in the number of African-Americans in the fourteenth congressional district. Initially, they posit that the African-American community in the old fourteenth congressional district was intentionally fragmented by the drafters of the plan, Senator Mellow and his Democratic colleagues in the Pennsylvania Senate. The plaintiffs theorize that the Senate Democrats were intent on drawing the new district lines so that congressman Santorum, the freshman Republican Congressman in the eighteenth congressional district, would find himself in a district populated by a majority of Democratic voters. Under the 1982 plan, the eighteenth district borders the fourteenth district and covers most of the Pittsburgh suburbs in a horseshoe shaped ring. In the Pennsylvania Supreme Court plan, approximately 30% of the voters in the new eighteenth congressional district are registered Republicans, as opposed to just over 50% in the existing eighteenth. *See* M. Barone and G. Ujifusa, *The Almanac of American Politics* 1087 (1992). The only way to accomplish this goal was to fracture the African-American communities of the fourteenth district, plaintiffs argue, and that, given this evidence of intent, the requisite showing of injury under § 2 is diminished. *See Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990).

The Supreme Court of the United States has interpreted the intentional discrimination requirement as demanding that in order to show a violation of the fifteenth amendment some type of "racially discriminatory motivation" be present in the enactment of a procedure or plan. *City of Mobile v. Bolden*, 446 U.S 55, 62 (1980); *Garza*, 918 F.2d at 766. We believe the same kind of showing is similarly necessary to establish a violation of the "intentional discrimination" prong of § 2.

We are far from convinced, however, that any intentional discrimination went into the creation of the new fourteenth congressional district. First, as pointed out by the Mellow intervenors, with the exception of Wilkinsburg, a predominately African-American suburb to the east of Pittsburgh,

the vast majority of the Democratic voters funnelled into the new eighteenth congressional district were from the former twentieth, a district which was disbanded. Certainly this fact strongly undercuts the assertion that African-American citizens were discriminated against by being transferred into the eighteenth congressional district from the fourteenth in order to defeat Congressman Santorum in the 1992 election. Second, looking at the overall plan, it would appear that racial discrimination was not on the drafters' agenda, as they added an additional minority majority district in Philadelphia.

The only evidence proffered here with regard to discriminatory intent involves the drafters' admitted political goal of placing Congressman Santorum in a disadvantageous district, and the fact that the minority population in the fourteenth congressional district is decreased by the plan. There is simply no nexus drawn between the intention to disadvantage Congressman Santorum and using African-American voters as the means to achieve this goal. We see the drafters' conduct as having very little to do with race and very much to do with politics. This is in stark contrast to the facts of two cases which plaintiffs offer as authority for their intentional discrimination claim, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) and *Buskey v. Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983). The plaintiffs in *Garza* demonstrated that years and years of racial gerrymandering had taken place with the intention of preserving incumbent white city council seats. 918 F.2d at 771. In *Buskey*, there was clear evidence of a feud between the mayor, who was in charge of the reapportionment of the city council seats, and an African-American councilman whom the mayor deliberately tried to chase from office by reducing the number of African-Americans in his district.

b. Discriminatory Effects

We now address the impact of the Pennsylvania Supreme Court plan on the political power of African-Americans residing in the new fourteenth congressional district and whether that impact--specifically, any political fall-out from reducing the

percentage of African-Americans from 23.860% to 17.811%—is sufficient to state a claim under § 2 of the Voting Rights Act.

It is important to note at the outset that the challenged reduction in the percentage of African-Americans resident in the fourteenth congressional district does not involve changing the district from "minority-in-majority" status to "minority-in-minority" status. Under the 1982 districting which the challenged plan would supersede, African-Americans are now a political minority, constituting slightly under one-fourth of the residents of the fourteenth congressional district. The challenged plan would reduce that minority status somewhat further. The factual question is whether that reduction would constitute a significant diminution of the political influence of African-Americans in the fourteenth congressional district. The legal question is whether, assuming there would indeed be a significant reduction of political influence, such a diminution would be cognizable under § 2.

The legal issue is framed by *Thornburg v. Gingles*, 478 U.S. 30 (1986). In that case, the Supreme Court identified, in the context of a challenge to a multi-member state legislative district, three threshold requirements to a § 2 challenge:

> First, the minority group must demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.[] Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.[] Third, the minority must be able to show that

> the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed []—usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51 (footnote omitted).

There has been a divergence of opinion among the lower courts as to whether the *Gingles* requirements apply other than in the context of a challenge to a multi-member district. These holdings are of no small significance in the present case, because the first *Gingles* factor would require that a minority group constitute a potential majority of voters in a relatively compact district before being permitted to challenge a redistricting plan pursuant to the VRA. Under *Gingles*, an "influence district"—a district in which a minority group influences political decisionmaking but is not large enough to constitute a majority—could not exist by definition for the purposes of the VRA, and the plaintiffs here could therefore show no statutorily protected interest in the fourteenth congressional district for the purposes of this action. *Compare Amour v. Ohio*, 775 F. Supp. 1044, 1050-52 (N.D. Ohio 1991) (holding that the *Gingles* prerequisites apply only to multi-member districts) and *Emison v. Growe*, 782 F. Supp. 427, 435-36 (D. Minn. 1992) (same) *with Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 651-55 (N.D. Ill. 1991) (refusing to recognize minority influence districts for Voting Rights Act purposes) and *Illinois Legislative Redistricting Comm'n v. LaPaille*, 786 F. Supp. 704, 716 (N.D. Ill. 1992) ("there are serious questions as to whether 'swing' claims are legally cognizable under the Voting Rights Act").

In examining the asserted discriminatory effects anticipated in the fourteenth congressional district, we will assume, *arguendo*, that a significant reduction of minority political power in an "influence district" is judicially cognizable under § 2 of the Voting Rights Act.

There appears to be no dispute that African-Americans in the old fourteenth congressional district generally voted as a bloc. However, the plaintiffs have presented little probative evidence that the remaining African-Americans in the new fourteenth congressional district, who represent some 18% of the population, will be unable to maintain a similar level of influence on elections under the Pennsylvania Supreme Court's plan.

Plaintiffs presented the testimony of Wendell Freeland, an African-American resident of Pittsburgh and a knowledgeable pundit on the subject of Allegheny County politics. Mr. Freeland testified that African-Americans in the old fourteenth congressional district were forced to forge coalitions with other blocs of voters to elect the representatives of their choice. Mr. Freeland also admitted that the democratic Congressman presently representing the district, William Coyne, has been reasonably responsive to the needs and concerns of his African-American constituents, and that Congressman Coyne would have little difficulty securing reelection despite the 6% reduction in the African-American population in the fourteenth district. These facts indicate that African-American voters have been able in the past, and will still be able continue in the future, to combine with like-minded white voters to elect their candidate of choice.[20]

Plaintiffs also argue that African-Americans will have diminished leverage, and thus a diminished voice, in influencing decisions made by the congressman representing the fourteenth congressional district after the election. The court heard

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[20] There was also testimony that the new fourteenth will be heavily Democratic, a fact which increases the importance of the Democratic primary. This will magnify the power of African-American voters, who are overwhelmingly Democrats. Moreover, the plaintiffs offered no evidence of bloc voting on the part of white voters which might result in the consistent defeat of African-American candidates of choice. To the contrary, it appears that African-Americans in Allegheny County have been able to elect their candidate of choice in congressional elections with some regularity.

testimony from Michelle Agatston, a resident of the community of Wilkinsburg, which abuts the eastern side of the City of Pittsburgh. Under the Pennsylvania Supreme Court plan, Wilkinsburg, which has a African-American majority population, is placed in the eighteenth congressional district along with several of the more affluent suburbs of Pittsburgh. Ms. Agatston testified that Wilkinsburg has much in common with the city and little in common with the well-to-do outlying communities with which it will share a congressman.

While relevant to the problems of Wilkinsburg, Ms. Agatston's testimony was of little probative value with regard to the issue before this court—whether the political voice of African-Americans in the fourteenth congressional district will be curtailed by the Supreme Court plan. Indeed, Ms. Agatston stated that she was not aware of any concern on the part of African-American voters in the new fourteenth district about a dilution of their political influence on their representative.

Mr. Freeland also did not venture an opinion on the whether the political voice of African-Americans in the fourteenth district has been diminished by the new plan. He did note that African-Americans in the new eighteenth congressional district, comprising only 7% of that district's population, would likely have little influence leverage over their representative, and that the African-American populations in Pittsburgh, Wilkinsburg and the former mill towns lining the Monongahela River have communities of interest not shared by some of the more prosperous outlying suburbs. He did not testify, though, that the failure to join these communities with high concentrations of African-Americans diluted the influence of African-Americans who will be residing in the new 14th.

Plaintiffs also presented testimony from Dr. Brian Sherman, an expert on voting rights matters. Dr. Sherman's testimony focused on the use of "report cards" found in the *Almanac of American Politics* in an attempt to show that, as the number of African-Americans found in a congressional district

dwindles, the responsiveness of the representative to African-Americans decreases in kind. These report cards reflect the ratings assigned to Congressmen by various interest groups, who judge them according to their voting records on issues of concern to those groups.

Dr. Sherman compared the voting record of Congressman Coyne as rated by ten organizations[21] with that of the retiring representative in the now defunct twentieth congressional district, Joseph Gaydos, and former Congressman William Gray, an African-American who represented the second congressional district of Pennsylvania in Philadelphia until his recent resignation. Approximately 7% of the population in Congressman Gaydos' district was African-American; in Congressman Coyne's district under the 1982 plan, the percentage was just over 23%; the second congressional district, under the 1982 plan, was nearly 85% African-American. Dr. Sherman then compared the three representatives' report cards, using Congressman Gray's ratings as the benchmark for responsiveness to issues important to African-Americans. Congressman Gaydos' rating by the ten groups was off by an average of 24 points from Gray (out of 100); Congressman Coyne missed the Gray mark by an average of 5.9 points. From this comparison, Dr. Sherman concluded that the 25% drop in African-American population in the fourteenth congressional district would diminish minority influence on Congressman Coyne.

We find Dr. Sherman's analysis to be seriously flawed. First, the voting report card as well as the testimony of Mr. Freeland establish that Congressman Coyne is reasonably responsive to African-American concerns. For the court to

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[21] Some organizations doing the grading in the *Almanac* had a generally "liberal" bent, and five had a generally "conservative" focus. For example, two of the "liberal" groups were the American Civil Liberties Union and Americans for Democratic Action, while on the "conservative" side, the Conservative Union and the Chamber of Commerce were represented.

conclude that, because the percentage of African-Americans in his district has dropped six points, he will suddenly become deaf to the petitions of those constituents would be pure conjecture. Second, on cross-examination, it was shown that the correlation between African-American population and responsiveness as gauged by the *Almanac*'s report card is not always present. For instance, Barney Frank, a white Congressman from Massachusetts representing a nearly universally white district, possessed a voting record similar to that of Congressman Gray. Conversely, Mike Espy, an African-American Congressman from Mississippi, holds substantially lower grades than either Congressman Gray or Congressman Coyne despite answering to a constituency which is 59% African-American. *Id.* at 382-83. As a consequence, the court is far from satisfied that, due to the decrease in African-American population in the new fourteenth congressional district, those African-Americans remaining in the district will be denied the degree of influence and access they enjoyed under the 1982 plan.

In conclusion, plaintiffs have presented little evidence that the decrease in African-American population in the fourteenth congressional district under the Pennsylvania Supreme Court plan will result in the loss of African-Americans' ability to elect the candidates of their choice or even to influence the decision-making of their representative. There was no evidence presented showing historical discrimination against African-Americans in Allegheny County nor was evidence presented of previous racially divisive campaigns. Further, there was no evidence offered establishing the existence of white bloc voting which operated to squeeze out minority candidates. Instead, it appears that African-Americans within the fourteenth congressional district, who would be a relatively small minority (under 25%) in any district configuration, form coalitions with others to ensure that their voices are heard and that their votes count as effectively as is possible given their numbers. With regard to political influence, it is clear that the incumbent in the fourteenth congressional district was and is responsive to the concerns of African-Americans, and there was no evidence tendered which suggests to us that he will not continue this practice. Accordingly, considering totality of

circumstances, we conclude that plaintiffs have not shown a violation of the VRA with regard to the fourteenth congressional district.

2. The Second Congressional District

The Pennsylvania Supreme Court plan reduces the percentage of African-Americans in the second congressional district from approximately 81% to 62%; a large portion of that decrease was shifted to the first congressional district, which now boasts a 52.4% African-American population, thus becoming a new minority majority district. *See Mellow v. Mitchell*, 607 A.2d 204, 219-20 (Pa. 1992).

The plaintiffs contend that the reduction of the percentage of African-Americans in the second congressional district below 65% causes a dilution of African-American voting strength in violation of § 2 of the VRA. The 65% figure is used by the Department of Justice, civil rights organizations, and many courts as the benchmark for what will constitute a safe district for a minority candidate of choice. *See Ketchum v. Byrne*, 740 F.2d 1398, 1408 n.7 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). This percentage, higher than a simple majority, is intended to compensate for historically lower voter turnout and registration among minorities in many voting districts and for a generally younger population base.

Plaintiffs, however, ascribe an almost talismanic significance to the 65% marker. Indeed, the simple fact that the minority population has been reduced below the 65% level is essentially the length and breadth of their evidence that African-American voters in the second congressional district are being denied their rights under § 2.

In the absence of evidence, plaintiffs invite us to adopt a burden-shifting procedure similar to that employed in Title VII cases, 42 U.S.C. § 2000e, under the authority of the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S.

792, 802 (1973). As contemplated by plaintiffs, once they have made out their *prima facie* case by demonstrating that the redistricting plan reduces the minority population below 65% in the district, then the burden shifts to those defending the plan to come forward with justifications for the retrogression. In support of this theory, the plaintiffs note that burden shifting has already been employed in the context of a redistricting challenge. As discussed earlier, the Supreme Court in *Karcher* established the principle that where a challenger to a redistricting plan shows that a lower population deviation between districts could have been achieved, the burden shifts to the drafters of the plan to produce legitimate reasons for the higher deviations. *Karcher*, 462 U.S. at 730-31.[22]

Plaintiffs argue that a burden-shifting analysis is necessary here because plaintiffs would otherwise be "forced to prove a negative," i.e. that a district with an African-American population below 65% will not have the opportunity to elect the candidates of their choice.

We are unwilling to adopt a burden-shifting approach for § 2 claims for a number of reasons. First, as the court noted above, the 65% figure is not an end in itself but is instead a rough guideline. If we required that the drafters of a plan bear the burden of justifying any proposed retrogression below the 65% mark, the court would be inscribing that figure in stone, a significance which is not justified by the figure's history, usage, or rational justification. *See Harrison v. Pennsylvania Legislative Reapportionment Comm'n*, C.A. 92-0603, 1992 U.S. Dist. LEXIS 5315 at *5-6 (E.D. Pa. April 21, 1992) (permitting retrogression under 65% in four Philadelphia state Senate districts); *Illinois Legislative Redistricting Comm'n v. LaPaille*, 786 F. Supp. 704, 712 n.7 (N.D. Ill. 1992) (expert described 65% figure as a " 'rough

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[22] Plaintiffs also point out that burden shifting has been used by the courts in cases involving discriminatory jury selection. *See Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986); *Duren v. Missouri*, 439 U.S. 357, 368 (1979).

rule of thumb' " and noted that the percentage of a majority actually needed varies by area); *Martin v. Mabus*, 700 F. Supp. 327, 336 (S.D. Miss. 1988) (60% majority district approved); *James v. City of Sarasota*, 611 F. Supp. 25, 27-28 (M.D. Fla. 1985) (court approved 50.1% African-American population despite the existence of racial bloc voting, due to high African-American voter turnout);[23] *Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss.), *aff'd sub nom Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984) (court rejected plaintiffs' argument that 58.3% African-American district was insufficient to permit African-Americans to elect candidates of their choice). As previously noted, the reason that 65% rather than 50% is used as a rule of thumb to demarcate the lower level of a "safe minority district" is to compensate for any underrepresentation of African-Americans among registered voters or among those persons who actually go to the polls and vote. Where, as in the second congressional district, the percentage of registered African-Americans is equal to or greater than the percentage of registered white voters and the turnout of African-American voters equals or exceeds the turnout of other voters, the justification for strict adherence to the 65% guideline is greatly reduced.

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[23] In *James*, the court quoted in its opinion from a letter sent to it by the Department of Justice. The Department stated that it does not

> "attach particular significance to a 65 percent population figure, and no attempt is made to add arbitrarily increments of five percentage points each to compensate for age, registration and turn-out differences.
>
> Accordingly, the Attorney General has frequently concluded, based on the facts presented in a particular submission, that districts containing less than 65 percent of the total are racially fair districts and that the plan submitted is entitled to Section 5 preclearance."

James, 611 F. Supp. at 32-33.

Second, there is no case law which lends support to the adoption of a burden shifting procedure in § 2 cases, a fact to which counsel for the plaintiffs admitted at trial. Third, plaintiffs cite no authority within the VRA itself or its legislative history that Congress had contemplated a set of shifting burdens. In fact, the statute indicates otherwise, as § 5 of the VRA provides that certain jurisdictions (of which Pennsylvania is not one) must demonstrate to the Department of Justice or to a District of Columbia district court that changes in their voting laws do not have a discriminatory purpose or effect. *See* 42 U.S.C. § 1973c; *Georgia v. United States*, 411 U.S. 526, 538 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). Certainly, if Congress had in mind a system such as that contended for by plaintiffs, it would have moved the burden to all states, not just a selected number.

Beyond their arguments regarding the propriety of shifting the burden of proof in the present case, the plaintiffs have presented little evidence which would tend prove the existence of any of the factors listed in Senate Report 97-417. There is no indication before this court of racially biased elections, white bloc voting, historical discrimination, or the existence of election procedures or devices intended to disenfranchise African-Americans in Philadelphia.

In fact, the vast majority of the evidence presented at trial pointed in the opposite direction, that is, that the African American populace in Philadelphia is an effective force at the polling place and that a 65% super majority in any one district is not necessary to ensure that they continue to be able to elect representatives of their choice. Defendants presented the expert testimony of Dr. Lisa Handley, who used both homogeneous precinct analysis (also referred to as "extreme case analysis") and bivariate ecological regression analysis to determine how the

Pennsylvania Supreme Court's plan would affect minorities' ability to elect the candidates of their choice in the second district.[24]

Dr. Handley testified that African-Americans appear to be registering to vote in higher numbers than whites in Philadelphia. She also concluded that African-Americans in the city participate in general elections at approximately the same rate as whites, and actually turn out for the Democratic primaries in greater numbers than whites. Dr. Handley also performed a racial bloc voting analysis, in which homogeneous precinct and bivariate techniques indicated that African-American candidates could look to cohesive support from African-American voters, and that they might expect a portion of white crossover votes as well. Last, defendants' expert examined "recompiled election returns," which involved looking at election returns in precincts which make up the new second congressional district for particular races over the past 10 years or so. From the various returns, she extrapolated that in nearly every case, the candidate preferred by African-Americans would have won in that district. From her study, Dr. Handley concluded that African-Americans would have an equal opportunity to elect the candidates of their choice in the reconfigured second congressional district.

The plaintiffs attacked Dr. Handley's analysis for leaving out two elections involving African-American candidates, the 1985 elections for District Attorney, where a white Republican defeated an African-American Democrat, and the 1984 presidential primary, where Jesse Jackson defeated Walter Mondale by only 12,000 votes (according to plaintiffs, Rev. Jackson garnered nowhere near a majority of the participating democratic voters in Philadelphia). We are reasonably satisfied, however, that Dr.

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[24] Testimony at trial established that these techniques are, although not foolproof, generally recognized as effective tools for gauging minority strength at the polls. Trial Tr. at 478-79. Even plaintiffs' expert stated that he was aware that regression analysis had been accepted in many Voting Rights Act cases. Trial Tr. at 635.

Handley's conclusions are sound. She has employed techniques which are generally recognized as valid in voting rights cases. The raw data that the court has seen would seem to support her conclusions. The fact that she failed to examine two other races, while perhaps sufficient to undercut the weight of her testimony, is certainly not sufficient to sink it entirely.

Moreover, Dr. Handley's judgments are bolstered by anecdotal testimony provided by two African-American state representatives with extensive experience in Philadelphia politics, Harold James and Vincent Hughes. Both gentlemen testified that African-Americans have a substantial voice in electing candidates of their choice in Philadelphia and that they would continue to have that voice in the new second congressional district. *Id.* at 532, 543. In addition, we note that, not inconsequentially, the incumbent African-American Congressman representing the second congressional district, Lucien Blackwell, won the April 28th Democratic primary under the district lines drawn by the Pennsylvania Supreme Court plan.

We also find it telling that, as a matter of measuring support for the plan in the affected communities among African-Americans, several African-American political groups from Philadelphia have thrown their support behind the Pennsylvania Supreme Court plan, including intervenors the Frederick Douglass Society and the Philadelphia Leadership Conference.

Last, in April of this year, a court within the Eastern District of Pennsylvania had an opportunity to examine Philadelphia's racial make-up and its impact on voting. That court rejected the contention that 65% super majority districts are necessary to ensure compliance with the VRA for state Senate elections. In *Harrison v. Pennsylvania Legislative Reapportionment Commission*, C.A. 92-0603, 1992 U.S. Dist. LEXIS 5315 (E.D. Pa. April 21, 1992), the plaintiffs challenged a state senate reapportionment plan which decreased the African-American

populations in four Philadelphia districts below the 65% guideline[25] following the addition of a new district to the city. After considering the expert testimony provided by the defendants, the *Harrison* court concluded that:

> the percentage of African-Americans is sufficient to assure that they can both nominate and elect candidates of their choice. Indeed, the testimony of plaintiffs' expert, when properly examined, leads to essentially the same conclusion. Based upon statistical analyses of past elections in the same geographical area covered by the four new districts now under challenge, the defense expert demonstrated, *inter alia*, that African-American voters tend to vote for African-American candidates, and that there is a substantial crossover voting by white voters for African-American candidates, with the result that African-American voters are not prevented, by white bloc voting, from electing the candidates of their choice.

Harrison, 1992 U.S. Dist. LEXIS 5315, at *67.

Looking at the totality of the circumstances, we are confident that the retrogression of the percentage of African Americans living in the second congressional district to under 65% will not harm the ability of African-Americans within that district to elect the candidate of their choice. Accordingly, we will rule

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[25] Some of the drops in minority population were precipitated by the addition of the new district. In one district, the percentage fell from 93% minority (85.3% African-American) to 65.6% (60.6% African-American); in a second the total minority population had 71.3% (70% African-American) under the old plan, while under the new it was 62.6% (61.5% African-American). *Harrison*, 1992 U.S. Dist. LEXIS 5315, at *2-3.

against the plaintiffs on their VRA § 2 claim with regard to the second congressional district.

B. The Fifteenth Amendment Claim

The fifteenth amendment prohibits discrimination against persons in matters of voting based on race or color. *City of Mobile v. Bolden*, 446 U.S. 55, 61-62 (1980); *Beer v. United States*, 425 U.S. 130, 142 n.14 (1976) (noting that the Supreme Court has never found a redistricting plan invalid under the fifteenth amendment). To be successful, a claimant under the amendment must show 1) that some type of racially discriminatory motivation was involved in the imposition of the election-related procedure or regulation and 2) that the procedure or regulation results in the denial or abridgment of the right to vote. *Id.* at 62-63.

Plaintiffs' fifteenth amendment claim is based on the alleged retrogression in the "influence" of African-Americans in the fourteenth congressional district. As we already noted, plaintiffs allege that the drafters of the plan adopted by the Pennsylvania Supreme Court intended to gerrymander the eighteenth congressional district so that the incumbent freshman Republican Congressman would be placed into a heavily Democratic district. To achieve that end, plaintiffs contend, the drafters decided to pull out some of the African-American voters from the fourteenth congressional district and place them in the eighteenth, thereby decreasing the African-American population in the fourteenth.

We have already held in the context of plaintiffs' VRA claim that plaintiffs have shown no intentional discrimination and, further, have shown no dilution of the ability of African American voters in the fourteenth congressional district to influence elections or to have their voices heard by their Congressman. Accordingly, we will enter judgment in defendant's favor on the fifteenth amendment claim.

V.

We thus reject each of the plaintiffs' challenges to the redistricting plan adopted by the Supreme Court of Pennsylvania.[26] We will dismiss the claims of plaintiffs Ryan, Loeper and Fisher. With respect to all other plaintiffs, judgment will be entered for the defendants.

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[26] To the extent plaintiffs challenge the constitutionality of the redistricting plan adopted by the legislature in 1982, their claims were rendered moot when the Supreme Court of Pennsylvania found that plan to be unconstitutional and enjoined its enforcement. Accordingly, we will dismiss those claims. We will also deny defendants' outstanding motions to dismiss for lack of standing. While not every plaintiff has standing to press all of the claims asserted By plaintiffs, there is at least one plaintiff with standing to press each claim so asserted. *See Specter v. Garrett*, 1992 U.S. App. LEXIS 6969 at *15 (3d Cir. Apr. 17, 1992); *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 485 (D.C. Cir. 1990).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHESTER NERCH, HERBERT BARNES, CLARENCE THOMPSON, JOSE, HERNANDEZ, MATTHEW RYAN, F. JOSEPH LOEPER, D. MICHAEL FISHER, MICHELLE AGATSTON, LUIS CRUZ and LAWRENCE R. WATSON, II,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 3:CV-92-0095
BRENDA K. MITCHELL, Secretary of the Commonwealth of Pennsylvania, and WILLIAM BOEHM, as Commissioner of the Bureau of Commissions, Elections and Legislation, Department of State of the Commonwealth of Pennsylvania,	:	
Defendants.	:	

FINAL ORDER AND JUDGMENT

This 13 day of August, 1992, **IT IS ORDERED** that:

1. The claims of plaintiff Ryan, Loeper and Fisher are dismissed for want of jurisdiction.

2. With respect to the other plaintiffs:

(a) Their claims seeking relief with respect to the 1982 redistricting plan are dismissed as moot, and

(b) Judgment is hereby entered for the defendants on the remaining claims.

/s/ Slyvia H. Rambo
SLYVIA H. RAMBO
United States District Judge